

**Court of Appeals, State of Michigan**

**ORDER**

Stephen Szwabowski v Dearborn Heights Police Officer Burdick

Docket No. 282388

LC No. 06-630661-CZ

Joel P. Hoekstra  
Presiding Judge

E. Thomas Fitzgerald

Brian K. Zahra  
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued March 24, 2009 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 21 2009

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STEPHEN SZWABOWSKI,

Plaintiff-Appellee,

v

DEARBORN HEIGHTS POLICE OFFICER  
BURDICK, MARILYN MAKOWSKI, Personal  
Representative of the Estate of JASON  
ANTHONY MAKOWSKI, DEARBORN  
HEIGHTS POLICE OFFICER THOMAS,  
DEARBORN HEIGHTS POLICE OFFICER  
CIOCHON, and DEARBORN HEIGHTS POLICE  
OFFICER SERVATOWSKI,

Defendants-Appellants.

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UNPUBLISHED

March 24, 2009

No. 282388

Wayne Circuit Court

LC No. 06-630661-CZ

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's opinion and order denying their motion for summary disposition of plaintiff's assault and battery claim pursuant to MCR 2.116(C)(7), based on governmental immunity. Plaintiff's claim stems from the use of a Taser on him while defendants were in the process of effectuating the arrest of plaintiff. Defendants claim the use of a Taser on plaintiff was objectively reasonable because plaintiff resisted arrest. Plaintiff claims he was cooperative throughout the arrest sequence and that the use of a Taser was without justification and constituted excessive force. Because this case presents a classic factual dispute between the litigants, we decline to disturb the order of the trial court. This appeal has been decided without oral argument pursuant to MCR 7.214(E). We affirm.

Facts and Procedural History

Defendant police officers arrested plaintiff on Halloween night for breach of the peace after he allegedly refused to shut down an elaborate Halloween display that had attracted disorderly crowds to the street. Allegedly because plaintiff was uncooperative, generally disruptive, attempted to incite the crowd to rise against the officers and raised his arms as if to strike the officers, Officer Makowski fired a Taser gun at defendant at least once. Plaintiff, while admitting that he was unhappy that the officers directed him to shut down his elaborate display, claims he was fully cooperative with the officers. Plaintiff offered the testimony of one

eyewitness who supported plaintiff's claim. By contrast, defendants offered their own testimony to support their claim that defendant was uncooperative and presented a danger to himself, the officers and members of the general public.

As a result of charges brought subsequent to his arrest, plaintiff entered a guilty plea to disturbing the peace. A charge of resisting or obstructing a police officer was dismissed. Plaintiff brought this action for assault and battery and other tort claims, alleging that the officers unjustifiably used excessive force in effecting the arrest and using the Taser.<sup>1</sup> Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), based on governmental immunity. The trial court denied the motion and this appeal followed.

### Legal Analysis

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7), this Court considers "all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.*, citing MCR 2.116(G)(5).

MCL 691.1407(2) provides qualified immunity for government agents acting within the scope of their duties, as follows:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

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<sup>1</sup> The trial court dismissed additional claims for malicious prosecution, false arrest, false imprisonment, and trespass. Plaintiff has not challenged the dismissal of those claims on appeal.

Michigan's governmental immunity statute does not shield an individual's intentional torts. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). Where an officer "uses more force than is reasonably necessary to effect a lawful arrest, [he or she] commits a battery upon the person arrested." *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987). Actions by a police officer that would otherwise constitute intentional torts are shielded from liability if those actions are justified because they were objectively reasonable under the circumstances. *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004).

In this case, conflicting evidence was presented regarding the circumstances surrounding plaintiff's arrest and the circumstances that led to the use of the Taser. The officers testified that plaintiff was uncooperative, swore at them, disobeyed their commands, and raised his arms as if to strike Officer Makowski, thereby leading to the use of the Taser. Conversely, plaintiff denied being uncooperative, physically resisting the officers, or appealing to the mob for support. He stated that he was attempting to make arrangements for a neighbor to pass out Halloween candy while he shut down his equipment when he was grabbed, kicked, hit, and shot with the Taser. Further, plaintiff claimed that the Taser struck him twice, whereas the police officers stated that it was used only once. Plaintiff submitted an affidavit from Kimm R. Bushey, Jr., who averred that plaintiff was cooperative with the officers, but an officer grabbed him by the shirt and another officer fired the Taser twice. Because the evidence shows that there is a genuine issue of fact whether the officers' use of force, including use of the Taser, was reasonably necessary under the circumstances, the trial court properly denied defendants' motion for summary disposition.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Brian K. Zahra